App. 25-26. Petitioners moved for permission to file a second rehearing petition to seek resentencing under *United States* v. *Booker*, 125 S. Ct. 738 (2005). On June 30, 2005, the court granted that motion and remanded the case to the district court to consider, pursuant to the procedures established in *United States* v. *Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc), whether petitioners' sentences would have been materially different under the sentencing scheme mandated by *Booker*. 2005 WL 1529702. The district court has not yet addressed the sentencing issues on remand.

ARGUMENT

Petitioners renew their challenges (Pet. 7-15) to the admission of excerpts of Garcia's October 2, 1995 interview, and to the disqualification of Powers's attorneys. These claims do not merit further review. The court of appeals' unpublished decision is interlocutory, is correct, and does not conflict with the decisions of this Court or any other circuit.

1. The interlocutory posture of this case in itself weighs against certiorari here. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari). After the filing of the petition for a writ of certiorari, the court of appeals remanded the case to the district court to determine whether resentencing was warranted in light of *United States* v. *Booker*, 125 S. Ct. 738 (2005). See 2005 WL 1529702 (June 30, 2005). The district court has not yet addressed the sentencing issues on remand. Petitioners will have the right to appeal the decision the district court makes on remand, regardless

of whether the court imposes new sentences or allows the original ones to stand. See *United States* v. *Ameline*, 409 F.3d 1073, 1085 (9th Cir. 2005) (en banc).

The denial of a writ of certiorari at this time does not preclude petitioners from raising the same issues (in addition to any sentencing issue resolved on remand) in a later petition if the Ninth Circuit affirms their sentences after the remand. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam). This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258-259 n.59 (8th ed. 2002). That practice promotes judicial efficiency by ensuring that all of petitioners' claims will be consolidated and presented in a single petition to this Court. *Ibid.* There is no reason to depart from that practice here.

2. Petitioners argue (Pet. 7-11) that the court of appeals erred in upholding the admission into evidence of excerpts from Garcia's interview with Agent Ortiz on October 2, 1995. They contend that admitting those excerpts violated Garcia's rights under the Self-Incrimination Clause of the Fifth Amendment. The court of appeals' holding is correct and, contrary to petitioners' assertion (Pet. 7), does not conflict with decisions of this Court.

When a governmental entity compels a person to answer questions, the Fifth Amendment generally precludes use or derivative use of the responses against that individual in a criminal prosecution. *Kastigar* v.

United States, 406 U.S. 441, 453, 458-461 (1972).[2] Because Garcia gave compelled statements on September 29, 1995, petitioners are correct that the United States had the burden under *Kastigar* to prove that the evidence it introduced against Garcia, including the October 2 interview, was derived from legitimate sources independent of the September 29 statements. See *id.* at 460-461.

Petitioners are mistaken, however, in suggesting (Pet. 8-9 & n.2) that the court of appeals failed to apply *Kastigar* in this case. Although the court of appeals' opinion did not cite *Kastigar* by name, the court applied the standard mandated by *Kastigar*, concluding that Garcia "became an independent and legitimate source of the evidence" by initiating contact with Ortiz and voluntarily answering questions during the October 2 interview. Pet. App. 2; cf. *Kastigar*, 406 U.S. at 461 (the relevant question is whether the government's evidence was derived from "legitimate independent sources").

Petitioners urge this Court (Pet. 9) to grant review in order to reject the argument that *Oregon* v. *Elstad*, 470 U.S. 298 (1985), and other *Miranda* cases "ha[ve] entirely superseded *Kastigar*" and its progeny. This case does not present an appropriate vehicle for addressing that issue. The court of appeals applied the *Kastigar* standard, and all parties in this case agree that *Kastigar* governs the admissibility of the October 2 interview. Contrary to petitioners' assertion (Pet. 9), the United States did not argue below—and is not asserting here—that *Elstad* or other *Miranda* cases

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[2] The Fifth Amendment does not bar use of compelled statements in a prosecution for perjury or making false declarations. See *United States* v. *Apfelbaum*, 445 U.S. 115, 124-132 (1980).

have displaced *Kastigar*. In fact, the United States acknowledged in the court of appeals that *Kastigar* governed this case. See 1 Gov't C.A. Br. 27, 31-32, 36. Petitioners are thus asking the Court to use this case to repudiate a position that the court of appeals did not adopt and no party is advocating.

The court of appeals not only used the proper standard but also correctly applied it to the facts of this case. "When a prior statement is actually coerced," a court must decide "whether that coercion has carried over into the second confession" by assessing whether there was "a break in the stream of events" between the two statements. *Elstad*, 470 U.S. at 310 (citing *Westover* v. *United States*, decided together with *Miranda* v. *Arizona*, 384 U.S. 436, 494 (1966), and *Clewis* v. *Texas*, 386 U.S. 707 (1967))[3]; see *Kastigar*, 406 U.S. at 461 ("The statutory proscription [against using immunized testimony directly or indirectly against the witness in a criminal case] is analogous to the Fifth Amendment requirement in cases of coerced confessions."); see also *Chavez* v. *Martinez*, 538 U.S. 760, 769-770 (2003) (plurality opinion) (the protection against

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[3] *Elstad* itself did not involve a statement that was "actually coerced"; rather, it involved two voluntary statements, the first of which was not preceded by *Miranda* warnings. The Court held that in those circumstances, the giving of *Miranda* warnings before the second confession was sufficient "to cure the condition that rendered the unwarned statement inadmissible." 470 U.S. at 311. Five Justices of this Court subsequently agreed that when police officers intentionally withhold *Miranda* warnings with an eye toward inducing the suspect to confess and then re-confess upon receiving warnings, the provision of *Miranda* warnings before the second confession, without more, is insufficient to render it admissible. *Missouri* v. *Seibert*, 124 S. Ct. 2601, 2608-2613 (2004) (plurality opinion); *id.* at 2614-2616 (Kennedy, J., concurring in the judgment).

the use or derivative use of a suspect's statements that are the product of coercive police interrogation is "coextensive with the use and derivative use immunity mandated by *Kastigar* when the government compels testimony from a reluctant witness").

Such a break occurred between the interviews on September 29 and October 2, 1995. Garcia actively sought the October 2 interview and dictated who would attend. The questioning on October 2 took place three days after the earlier interview and was held at a motel, a far more neutral location than the prison where Garcia had made his earlier compelled statements. See *Elstad*, 470 U.S. at 310 (passage of time and change of locations between statements are relevant in assessing whether taint has carried over to the second interview). Moreover, at the outset of the October 2 interview, Garcia received a *Miranda* warning that he had the right to remain silent and that anything he said would be used against him in court, in sharp contrast to the September 29 interview where he was told that he must answer questions but that his statements could not be used against him in a criminal proceeding. These facts show that the October 2 interview was untainted by the compelled statements on September 29. Thus, by answering questions during the untainted October 2 interview, Garcia himself became a legitimate, independent source of evidence for purposes of *Kastigar*.[4] Pet. App. 2.

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[4] Not only was there a clear break in the stream of events, but also, as the district court found with respect to the portions of the October 2 interview it deemed admissible, the questions that Agent Ortiz put to Garcia were in no way influenced by Garcia's prior compelled testimony. See Pet. C.A. E.R. 24-26, 192-207.

Petitioners nonetheless contend (Pet. 4, 10) that the October 2 interview was tainted because Garcia supposedly felt obliged to request that interview because one of the investigators had stated during the September 29 interrogation that his compelled answers could be used for impeachment purposes. That fact-bound issue does not warrant this Court's review. At any rate, it is doubtful that Garcia misunderstood his legal protections by the time he began answering substantive questions during the September 29 interview. Although one prison official initially stated that "anything as you know in this interview may be used for impeachment purposes," Pet. C.A. E.R. 43, a different investigator—the one who questioned Garcia most extensively—later advised Garcia just before the substantive portion of the interview that "none of your statements nor any additional evidence which is gained by reason of such statements can be used against you in any criminal proceedings," *id.* at 47.

Petitioners assert (Pet. 9), however, that the government had the burden under *Harrison* v. *United States*, 392 U.S. 219 (1968), of proving that Garcia would have requested the interview on October 2 even if he had not been compelled to speak on September 29. *Harrison* is inapposite here.

Harrison involved a decision by a criminal defendant to testify at trial after the prosecution had already violated his rights by introducing his illegally obtained confessions as evidence at the same trial. After the defendant's conviction was overturned because of that violation, the prosecution sought to introduce the defendant's testimony from the first trial as evidence against him on retrial. 392 U.S. at 220-221. By placing the burden on the prosecution to prove that the defendant would have testified at the first trial even if no

violation of his rights had occurred, this Court sought to prevent the government from unjustly benefitting from a violation for which it was responsible. See *id.* at 224-225.

Here, by contrast, the October 2 interview was not preceded by any such violation of Garcia's rights. Although investigators had compelled Garcia's statements on September 29, 1995, such compulsion itself does not violate the Fifth Amendment. A violation, if any, would occur only if the compelled statements (or evidence derived therefrom) were used against Garcia in a criminal trial. See *Chavez*, 538 U.S. at 767 (plurality opinion); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). When he gave the interview on October 2, Garcia was not confronted with the dilemma of having to testify in order to mitigate the effects of a constitutional violation that had already occurred.

Nor does *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004) "thoroughly undermine[]" (Pet. 10) the court of appeals' conclusion that Garcia became an "independent and legitimate source." Pet. App. 2. In *Seibert*, the police intentionally withheld *Miranda* warnings until an interrogation had produced a confession and then, after a short break, advised the suspect of her *Miranda* rights and had her repeat the confession. The plurality concluded that the second confession was inadmissible because, under those circumstances, the *Miranda* warnings were ineffective. 124 S. Ct. at 2609-2613 (plurality opinion). *Seibert* involved what was, in effect, a single interrogation. See *id.* at 2610 n.4, 2613. The two portions of the interview in *Seibert* were separated by only 20 minutes, and both were initiated by the police and took place in the same location. *Id.* at 2606, 2612. By contrast, Garcia's subsequent interview followed the earlier one by three days, Garcia requested

the October 2 interview, and the interviews took place in very different settings. *Seibert* thus does not call into question the correctness of the court of appeals' decision.

Finally, petitioners seek a remand in light of *United States* v. *Patane*, 124 S. Ct. 2620 (2004), on the ground that the government's arguments below "sought to obliterate" the distinction between "statements taken without *Miranda* warnings (though not actually compelled)" and "actually compelled testimony." Pet. 10 (quoting *Patane*, 124 S. Ct. at 2627 (plurality opinion)). Arguments by parties that are not adopted by the court of appeals do not provide a basis for this Court's review. At any rate, petitioners have misstated the government's position. The United States did not contend that the admissibility of the October 2 interview should be judged by the same standard that would apply if Garcia's September 29 statements had been voluntary but elicited in violation of *Miranda*. Rather, the United States acknowledged that the proper standard was the one this Court applies in cases "[w]hen a prior statement is *actually coerced*." 1 Gov't C.A. Br. 32-33 (quoting *Elstad*, 470 U.S. at 310 (emphasis added)).

3. The court of appeals correctly upheld the disqualification of Powers's original counsel, as well as the procedures used by the district judge in ruling on the disqualification issue. Those holdings do not conflict with the decisions of this Court or any other circuit.

a. The Sixth Amendment encompasses a qualified right to have counsel of one's choice, which may be overcome by a showing of "a serious potential for conflict" of interest. *Wheat* v. *United States*, 486 U.S. 153, 164 (1988). Such a conflict can arise when defense counsel's former clients are called as government wit-

nesses. *Ibid.* One concern "is that the lawyer will fail to cross-examine the former client rigorously for fear of revealing or misusing privileged information." *Hall* v. *United States*, 371 F.3d 969, 973 (7th Cir. 2004) (internal quotation marks omitted).

The court of appeals correctly concluded that Rains's continued representation of Powers "presented a serious potential for conflict of interest." Pet. App. 2. The Rains firm had represented seven correctional officers who testified before the grand jury that indicted Powers. At the time of the disqualification motion, the United States anticipated calling some of the officers as government witnesses, and, in fact, one of them ultimately testified as a prosecution witness at trial and was cross-examined by Powers's counsel. Thus, had the Rains firm not been disqualified, it would have been placed in the untenable position of having to cross-examine a former client.

Petitioners argue that the court of appeals' decision is "directly at odds" (Pet. 14) with *Rodriguez* v. *Chandler*, 382 F.3d 670 (7th Cir. 2004), cert. denied, 125 S. Ct. 1303 (2005), which held that the disqualification of a defendant's attorney was error. *Rodriguez*, however, involved a quite different set of facts. The prosecutor in *Rodriguez* successfully sought disqualification of defense counsel on the ground that another client of the attorney would be called as a vital government witness. *Id.* at 671-672. In fact, the client was never called to testify, the prosecutor "never explained this about-face," *id.* at 672, and the government did not argue to the Seventh Circuit that the client "could have provided *any* admissible evidence," *ibid.* Thus, in the opinion of the *Rodriguez* court, the prosecutor's entire justification for disqualification had evaporated without explanation. That is not the case here. One of the

former Rains clients did testify as a prosecution witness—a fact that by itself demonstrates that disqualification was proper. See p. 6, *supra*. Moreover, the government tried to call another of the former clients to testify about an assault on an inmate, but that officer invoked his Fifth Amendment privilege.[5] See *ibid.*

Although the other former clients did not testify as government witnesses, that fact neither undermines the legitimacy of the disqualification nor supports petitioners' claim that the prosecutor made "false" representations (Pet. 14-15). The potential for conflict must be judged "not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly." *Wheat*, 486 U.S. at 162. In this case, the inherent difficulty of predicting in advance precisely how the evidence and litigation strategies would evolve was complicated by the lapse of nearly two years between the filing of the disqualification motion and the start of trial.

b. Petitioners argue (Pet. 11-13) that the district court deprived Powers of due process by receiving *ex parte*, *in camera* submissions from the government in ruling on the disqualification motion. The court of appeals correctly rejected that argument.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965)). Powers was afforded such an opportunity. The district judge held two hearings prior to ordering disqualification. A portion of the first hearing

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[5] **[REDACTED.]**

and the entire second hearing were open to the defense. Moreover, Powers and his attorneys filed numerous written submissions in opposition to the disqualification motion, including declarations from Powers and each of the seven former clients. After the disqualification ruling, the district court held another hearing on a motion to reconsider at which the defense again made its case.

The district court's limited use of *ex parte*, *in camera* procedures was justified by the need to preserve the secrecy of an ongoing grand jury investigation, protect grand jury witnesses from intimidation or retaliation by petitioners and their co-conspirators, and prevent premature disclosure of the prosecution's strategy for encouraging those grand jury witnesses to cooperate with the government. See Pet. C.A. Supp. E.R. 144-148. This Court "consistently ha[s] recognized that the proper functioning of our grand jury system depends upon the secrecy of the grand jury proceedings." *Butterworth* v. *Smith*, 494 U.S. 624, 630 (1990) (quoting *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218 (1979)). "This 'indispensable secrecy of grand jury proceedings' must not be broken except where there is a compelling necessity." *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (quoting *United States* v. *Johnson*, 319 U.S. 503, 513 (1943)).

Petitioners suggest (Pet. 11), however, that the court of appeals' decision conflicts with *Kentucky* v. *Stincer*, 482 U.S. 730 (1987), which stated that the Due Process Clause guarantees a defendant "the right to be present at any stage of the criminal proceeding that is critical to the outcome if his presence would contribute to the

fairness of the procedure." *Id.* at 745.[6] But "this privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow.'" *Ibid.* (quoting *Snyder* v. *Massachusetts*, 291 U.S. 97, 106-107 (1934)). Thus, the "presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985).

Powers has identified no reason to believe that his presence during the *in camera* portion of the first hearing could have affected the outcome of the disqualification ruling. See *Stincer*, 482 U.S. at 747 (defendant's exclusion from competency hearing did not violate due process where he gave "no indication that his presence * * * would have been useful in ensuring a more reliable determination as to whether the witnesses were competent to testify"). Indeed, the district court emphasized that even if it had disregarded the information the government presented for *in camera* and *ex parte* review, "there is and was sufficient evidence for the court to make the exact ruling that it did on this record."[7] Pet. C.A. Supp. E.R. 150.

Contrary to petitioners' suggestion (Pet. 12-13), the court of appeals' rejection of Powers's due process argument does not conflict with the decisions of other circuits. Petitioners cite a number of decisions indi-

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[6] Petitioners also cite *Arizona* v. *Fulminante*, 499 U.S. 279 (1991) (Pet. 11), but that decision addressed whether admission of a coerced confession can be harmless error, not whether the defense can be excluded from a hearing.

[7] Powers was able to review the *in camera* submissions for purposes of his appeal, yet his petition does not identify anything in those materials that would have been useful to him in opposing the government's motion.

cating that, when confronted with a potential conflict of interest, a judge ordinarily should conduct a hearing and provide the defense an opportunity to present argument and evidence in support of its position. The district judge in this case conducted not one but three hearings on the disqualification issue (two of which were open in their entirety and a third that was partially open to the defense) and allowed Powers to make numerous written and oral submissions in opposition to disqualification. See Pet. C.A. Supp. E.R. 11-27, 71-152; Gov't C.A. E.R. 1-30.

Nor does the court of appeals' decision conflict with *United States* v. *Mays*, 69 F.3d 116 (6th Cir. 1995), cert. denied, 517 U.S. 1246 (1996) (see Pet. 13), which stated that a disqualification motion "will ordinarily require a hearing at which both parties will be permitted to produce witnesses for examination and cross-examination." 69 F.3d at 121. The court in *Mays* did not hold that such a hearing is always required, and indeed, affirmed a disqualification ruling despite the trial judge's failure to hold *any* hearing. *Id.* at 121-122. Moreover, nothing in *Mays* suggests that all hearings must be open to the defense even where, as here, such openness would violate grand jury secrecy and expose witnesses to possible intimidation.

Finally, petitioners assert (Pet. 11) that the court of appeals' decision has "potentially sweeping consequences" because it might allow judges to bar the defense from hearings on motions to exclude evidence or from the government's closing argument at trial. Nothing in the court of appeals' opinion supports that concern, because the proceedings at issue here concerned the disqualification of counsel, not matters going to the merits of the case. At any rate, the decision is unpublished, non-precedential, and hence unlikely to

significantly affect the development of the law, given the Ninth Circuit's limitations on citation of unpublished opinions. See 9th Cir. R. 36-3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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